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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. ~~1187~~ 237

LAR DALY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

FEDERAL COMMUNICATIONS COMMISSION,

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Lar Daly respectfully prays that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 2, 1957.

ORDER BELOW.

The order of the United States Court of Appeals for the Seventh Circuit is filed herewith in the Appendix* (App. pp. 27a-28a, 101a).

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* Filed and submitted herewith under separate cover.

JURISDICTION.

A final order of the Court of Appeals for the Seventh Circuit, dismissing the cause of action, was entered on March 7, 1957. A petition for rehearing was denied on April 2, 1957. The jurisdiction of this Court is invoked pursuant to Public Law 901, 5 U.S.C., Section 10 (1040), according to the provisions of 28 U.S.C., Sup. III, #1254 (1). Jurisdiction of the Court of Appeals was invoked pursuant to Public Law 901, 5 U.S.C., Section 4 (5 U.S.C. 1034), according to the provisions of the Communications Act, 47 U.S.C., 402(a).

QUESTION PRESENTED.

Whether the Court of Appeals erred in granting Respondents' Motion to Dismiss on grounds that "Petitioner has alleged no justiciable case or controversy and the case is accordingly moot."

Articles of the Federal Constitution and Amendments thereto, Federal Statute, and Rules and Regulations of the Commission involved.[1]

1. FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED.

Amendment (Article X) of the Bill of Rights to the U. S. Constitution, which reserves absolute right and supreme jurisdiction to the duly constituted authorities of the sovereign States of this Union, in respect to all matters pertaining to Elections, held within their state borders.

Article 1, Section 8, of the U. S. Constitution, wherein the Congress, or any of its created Federal Regulatory Agencies, is NOT specifically granted the power to defy, question, circumvent, or disregard, the certified act of a

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[1] "Commission" refers to the Federal Communications Commission.

State, in respect to any matter pertaining to an Election within a State's borders.

Article 1, Section 10, of the U. S. Constitution, wherein the power of a State to be supreme in all matters pertaining to Elections within its state borders, is NOT specifically forbidden.

Article Three, Section 2, paragraph B, of the U. S. Constitution, which gives the U. S. Supreme Court the right to review, both as to law And To Fact, the decisions of the lesser court in which this case must have originated.

Article Four, Section 1, of the U. S. Constitution, which states that the public acts and records of each state are to be recognized as valid in every other state, and consequently by the Federal Government and all its agencies, which owes its very establishment and entity and derives its sovereignty, within Constitutional limits, from the freely delegated powers of 12 of the original 13 States of this American Union.

Article Six, paragraphs B and C, of the U. S. Constitution, which states that the Constitution, and the laws made as the result of it, are to be the supreme laws of the United States; and that all Federal and State governmental and judicial officers, which includes the officers of quasi-judicial Federal Regulatory Agencies, must be bound by oath or affirmation to support the Constitution of the United States.

Amendment (Article V) of the Bill of Rights to the U. S. Constitution, which states in part as follows: "nor (shall a person) be deprived of life, liberty, or property, without due process of law". The word "property" as used therein can logically be construed as meaning an intangible right, such as the legal right to the status of

being declared and accepted as a legally qualified candidate for public office, as well as the tangible right of owning a house, real estate, or other personal property. Further, a person cannot be deprived of such property without a fair hearing or a court trial.

2. FEDERAL STATUTE INVOLVED.

Section 315 of the Communications Act of 1934, as amended, which provides:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.
>
> (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.
>
> (c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

3. COMMISSION RULES AND REGULATIONS INVOLVED.

Commission Public Notice Primer of September 8, 1954 (FCC 54-1155-9105), entitled "Use of Broadcast Facilities by Candidates for Public Office." Page 1, Column 3, of said Public Notice Primer specifies in detail the Commission definition of what it considers a "legally qualified candidate" to mean. (Appendix, p. 67a.)

Page 2, Column 3, IV, Question and Answer No. 10, of the same Public Notice Primer, states as follows: "Who Is a Legally Qualified Candidate?"

10. Question—How can a station know which candidates are legally qualified?

Answer—The determination as to who is a legally qualified candidate for a particular public office within the meaning of Section 315 and the Commission's rules must be determined *by reference to the law of the State in which the Election is being held.* In general, a candidate is legally qualified if he can be voted for in the state or district in which the election is being held, and, if elected, is eligible to serve in the office in question. (Appendix, p. 67a) (Italics Petitioner's.)

Index to certified Record, filed by the Commission with the Court of Appeals on February 5, 1957, attached hereto and referred to as Appen. Index.

Petitioner submits said Index to Record as a factual and concise chronology of his case before the Commission, previous to the time action was brought in the Court of Appeals on December 28, 1956, with the filing of his Petition for Review. The following Item Nos. are particularly cited for the Court's consideration:

On page 1 of Index to Record .....Item No. 6

On page 2 of Index to Record.....Items No. 14, 16, 18, 23

On page 3 of Index to Record.....Items No. 37, 3, 4, 5

On page 4 of Index to Record....Items No. 7, 8, 12, 14, 20

On page 5 of Index to Record....Items No. 23, 36, 39, 40

On page 6 of Index to Record.....Item No. 52

STATEMENT.

I - VIII.

The Fact of Petitioner Having Been A "Legally Qualified Candidate"; The Commission Having Knowledge of Same; And The Commission Being In Error In Denying Petitioner's Request To Be Declared A "Legally Qualified Candidate", Cannot Now Be Denied.

The fact of Petitioner having been a "legally qualified candidate", according to the laws of the States of Illinois, Indiana, and Montana; and according to the Rules and Regulations of the Commission itself, from the dates of February 8 to August 22, 1956, inclusive, obviously cannot now be denied. Attached as exhibits to his Petition for Review, and made a part thereof, were authentic copies of his certification as a "legally qualified candidate", by the duly constituted authorities of the States of Illinois, Indiana, and Montana. (Appendix, pp. 12a-16a)

II.

The fact of the Commission having knowledge of Petitioner's being a legally qualified candidate, according to the applicable laws of the States of Illinois, Indiana, and Montana; and according to its own Rules and Regulations, obviously cannot now be denied.

(a) The Commission knew on or about the 14th of March, 1956, of a letter from the Illinois Secretary of State to Petitioner, dated February 24, 1956, which stated, in effect, that Petitioner remained a "legally qualified candidate" in Illinois, from the date of his certification on February 8, 1956; and that nothing he may do of his own volition, after February 8, 1956, could decertify him from the status of being a "legally qualified candidate." (Appen. Index, p. 36, Item 14, R. 35)[1]

[1] "R" refers to Record filed with Court of Appeals.

(b) The Commission definitely knew of the above letter on April 4, 1956, when Petitioner included the original of same in his Informal Complaint to the Commission. (Appen. Index, p. 35, Item 1, R. 1-5)

(c) The Commission definitely knew of Petitioner's retention of his status as a "legally qualified candidate" in Illinois, from the letter it received from the Illinois Secretary of State, dated April 9, 1956, in response to the Commission's telegram of April 5, 1956. (Appen. Index, p. 39, Items 7, 14, R. 90, 97-98)

(d) Petitioner, on March 29, 1957, served the Commission with a copy of an Emergency Motion, filed with the Court of Appeals on that date, which contained a copy of a certified Affidavit, given to Petitioner by the Illinois Secretary of State on March 28, 1957, which stated in effect that Petitioner was certified as a "legally qualified candidate" on February 8, 1956, and that he continued as such and remained a legally qualified candidate, up to and including the date of the Illinois Presidential Primary Election on April 10, 1956. (Appendix, 98a-100a)

(e) The Commission definitely knew on April 6, 1956, that Petitioner was a "legally qualified candidate" in the State of Indiana, for the Indiana Presidential Primary Election of May 8, 1956. On April 5, 1956, the Commission sent the following telegram to the Indiana Secretary of State:

> "Secretary of State, Indianapolis, Ind. Wash D.C. Apr 6 AM 1:00 Request has been received from Lar Daly for consideration as a legally qualified candidate for Republican nomination for the office of President under the provisions of Section 315 of the Communications Act of 1934 as amended, 47 U.S.C. Please let us know if Lar Daly is such a candidate in your state."
>
> (Signed) Mary Jane Morris, Secretary, Federal Communications Commission. (Appen. Index, p. 39, Item 8, R. 91)

On April 6, 1956, the Indiana Secretary of State replied as follows:

> "Mary Jane Morris, FCC, Washington, D.C. Indianapolis, Ind., April 6, 1956. Lar Daly has filed his declaration as a Republican candidate for President of the U. S. His name will appear on the official ballot in May 8 Primary election. (Signed) Crawford F. Parker, Secretary of State of Indiana. (Appendix 44a)

(f) On April 25, 1956, Petitioner was notified by letter from the Montana Secretary of State that he would be certified at the proper time, as a legally qualified candidate for the June 5, 1956, Montana Presidential Primary Election. Petitioner was so certified in Montana on May 2, 1956, the day before the Commission on May 3, 1956, denied his request for rehearing of the Commission's original Directive against him, made on April 11, 1956. (Appendix 75a)

III.

The fact of the Commission having erred in its original ruling against Petitioner, *i.e.*, "that he was not a legally qualified candidate", made on April 11, 1956; and its subsequent repetition of the same error, made on October 31, 1956, both rulings being predicated on the same and inseparable cause of action, cannot now be in dispute.

IV.

(a) Petitioner believes that a conspiracy existed between the Commission and the 4 major Television and Radio networks to deny him the free and equal time due under Federal Law. The 4 networks in question are: National Broadcasting Co., Columbia Broadcasting System, American Broadcasting Co.,

and Mutual Broadcasting System, all with General Offices in the City of New York, N. Y.

(b) Petitioner believes that the principal reason for the Commission and the networks denying him the free and equal air time, was because they did not want the mass of the American people to hear what Petitioner had to say as a candidate for President of the United States.

(c) It is generally known that Petitioner publicly and consistently espouses a political doctrine known as, "America's Interests First in Politics." The tenets of this doctrine are greatly at variance with those held by certain elements who are extremely influential in the television and radio industry.

(d) It is pertinent to Petitioner's belief, stated above, that Section 315 of the Communications Act, and the Rules and Regulations of the Commission, prohibits any censorship of what Petitioner might say, if he had been granted the free and equal television and radio time.

V.

(a) Petitioner believes that the Commission is actually controlled by the 4 networks; whenever the networks desire to exercise such control. The shocking disclosures made by the Chairman of the Commission to a U. S. House of Representatives sub-Committee on Small Business, headed by Congressman Joe Evins (D-Tenn), on March 21, 1956, is hardly credible of belief in a free and representative Republic. (Appendix 69a)

(b) On June 9, 1957, the anti-Trust sub-Committee of the House of Representatives Judiciary Committee, made public its official Report, dated March 13, 1957, on the relationship between the Commission and the major Television and Radio networks. The Commission is supposed to regulate the networks in the best interests of all the American people, as intended and directed by the Congress of the United States. Reproduced below is the Frontspiece of said Report, and on pages 144 and 145 is stated, in part, the following:

> (2) *FCC practices and policies.*—In testimony before the committee on this NBC-Westinghouse matter as well as in testimony and documentary evidence submitted on other subjects, references were made to informal private conferences and discussions between FCC Commissioners and representatives of industry, some of whom were directly interested in problems pending before the Commission. The evidence demonstrates that for at least the past 10 years an air of informality has surrounded cases pending before the Commission. This has permeated the Commission's administrative process to a point where various members of the Commission without reluctance have, during the past decade, repeatedly discussed with one or more interested parties the merits of pending cases—even going so far as to indicate how particular Commissioners would vote.
>
> This practice, insofar as it relates to pending adjudications, is repugnant to fundamental principles of quasi-judicial procedure.[9] The committee recognizes the need for some informality in certain phases of the Commission's work, but where conflicting rights or claims of parties are being adjudicated, informal ex parte discussion between a Commissioner and a litigant or his representative treads dangerously close to, if it does not transgress, the outer limits of due process of law.

[9] It may also be a violation of section 409 of the Act. 47 U.S.C., sec. 409 (c) (1952).

> Accordingly, the committee believes it imperative that the Commission adopt without delay a code of ethics that would proscribe conduct of this kind by Commissioners and their staff and by attorneys and other representatives of industry alike. Such a code, like one already adopted by the Civil Aeronautics Board, should make clear and definite the line separating permissible from nonpermissible informal contacts between Commission personnel and parties. It should remove any doubt that now may exist concerning the impropriety of private communications with members of the agency concerning adjudicatory matters.

The above sections of the anti-Trust sub-Committee's Report is particularly appropriate to the Commission's seeking and being influenced by the opinions of the 4 networks, in respect to Petitioner's appeal to the Commission that he be declared a "legally qualified candidate", and granted the free and equal time due him, according to Section 315 of the Communications Act.

VI.

On April 5, 1956, the Commission sent identical letters to the 4 networks, asking their opinions on Petitioner's request that he be declared a "legally qualified candidate", and that the Commission order the networks to grant him the free and equal time as required by law. (Appen. Index, p. 38, Item 3, R. 86, p. 39, Items 4, 5, 6, R. 87, 88, 89)

Replies were received from the 4 networks between the dates of April 9-11, 1956, inclusive. Naturally, the networks' replies were favorable to their own position in the

matter, and, in reality, were nothing more than a repetition of the excuses given to Petitioner by the same 4 networks a few weeks previously. (Appen. Index, p. 40, Items 16, 17, 19, 22, R. 100, 101-101A, 112-117, 121-128)

On October 5, 1956, the Commission again sent identical letters to the 4 networks, asking for their comments on Petitioner's Complaint to the Commission, filed on October 2, 1956. Replies were received from the 4 networks between the dates of October 15-19, 1956. As expected, the networks' replies were masterpieces of evasion in attempting to circumvent the undeniable fact of Petitioner's having been certified as a "legally qualified candidate", by the duly constituted authorities of the sovereign States of Illinois, Indiana, and Montana, on February 8, April 3, and May 2, 956, respectively. (Appen. Index, p. 41, Items 40, 41, 42, 43, R. 163, 164, 165, 166 — p. 42, Items 44, 45, 46, 47, R. 167-168, 169-175, 176-177, 178-179.

VII.

On April 11, 1956, the Commission issued its Directive against Petitioner, refusing to declare him a "legally qualified candidate." The Directive bore the title "By Order of the Commission", with a signature, presumably that of George C. McConnaughey, Chairman of the Commission. (Appendix 7a, 8a)

The Commission reached such decision despite all the overwhelming evidence, of documented facts before it, supplied by Petitioner. The contemptuous defiance of the inherent rights of the sovereign States of Illinois, Indiana, and Montana; and the incredible denial of the statutory rights of an American citizen, is impossible of belief but for the fact of being an obvious reality.

On April 14, 1956, Petitioner, in a telegram to the Commission, pleaded for at least a chance to appear before the Commission personally, and thus be heard in his own behalf. To grant such appeal, was the very least the Commission should have done to preserve some semblance of justice and fair play in the matter. (Appen. Index, p. 40, Item 23, R. 129)

On May 3, 1956, an Assistant Secretary of the Commission, by telegram, refused Petitioner's request. (Appen. Index, p. 41, Item 36, R. 142)

On October 31, 1956, the Commission again issued a Directive against Petitioner, denying his October 3, 1956 request, in a Formal Complaint, that he be declared a "legally qualified candidate." The Commission, flagrantly disregarding the paramount issue of basic justice in the matter, ruled that Petitioner's cause was now moot, and as the nominee of the 1956 Republican National Convention had already been selected, the relief requested by Petitioner could not then be granted. (Appendix 9a-12a)

VIII.

In its October 31, 1956 ruling against Petitioner, the Commission held that there WAS a time limit as to when the "free and equal" television and radio time sought by Petitioner could be made available. In respect to such interpretation of its own Rules and Regulations by the Commission, Petitioner cites Question and Answer No. 33, of the Public Notice Primer, dated September 8, 1954, heretofore mentioned, of the Commission itself, regarding its own Rules and Regulations. (Appendix 67a) On page 4, column 1, of said Commission Public Notice Primer is stated, in part:

> 33. "Question—If a candidate secures time under section 315, must he talk about a subject directly related to his candidacy?"

Answer—No. The candidate may use the time as he deems best. To deny a person time on the ground that he was not using it in furtherance of his candidacy would be an exercise of censorship prohibited by section 315 (WMCA, Inc. R.R. 1132)"

In the light of the clearly expressed intent and meaning of Answer 33, Petitioner points out the fallacy, and lack of logic and common sense in the Commission's dictum to Petitioner, that "free and equal television and radio time," due, of right, to a "legally qualified candidate," DOES HAVE a definite time limit as to its availability for use by the candidate.

The Major Premise advanced in Answer 33 is as follows: Admittedly, in justice, law, and of right, the "free and equal time" must be given to the "legally qualified candidate", assuming that the Television and Radio networks are still engaged in the telecasting and broadcasting business, and their physical properties and facilities are still in a suitable condition for the proper use of same.

The Minor Premise would then logically be as follows: That by using the time, the candidate does NOT necessarily have to possess the intention in his own mind, nor need he declare, imply, or infer publicly, in any manner whatsoever, that the purpose in his using the time is to further his candidacy politically, with the eventual objective being victory in the election in which he is a candidate.

If both the Major and Minor premises are true, then to hold, as does the Commission, that there is a definite terminal date on the time rightfully due the candidate, is a contradiction in terms. Why set a time limit on a right which the Commssion admits the candidate may use for practically any purpose whatsoever, which right the Commis-

sion definitively declares need have no connection whatsoever with the candidacy of the "legally qualified candidate."

In logic and common sense, only one reasonable interpretation can be deduced from the language in Answer 33. It is, to preclude and forestall the possibility of the networks, or any television or radio station, from deliberately evading its obligation of providing the "free and equal time" to a "legally qualified candidate", by stalling and delaying the issue through administrative, judicial or any other means, until the date of the election in which the candidate is a contender, has passed, and then saying to all and sundry, "well, the election is over with now; the candidate who might have been entitled to time was defeated, the "free and equal time" cannot now do his past candidacy any possible good; so we will just forget about it and not even consider giving him the time now."

An examination of the Record and other pertinent documents in the case would show that such is what happened to Petitioner in this matter.

IX.

Sections Of The Communications Act Relevant To Petitioner's Case.

Section 4, paragraph j, on page 8 of the Communications Act states in part as follows:

> "Any party may appear before the Commission and be heard in person or by attorney."

Comment—Petitioner was denied that right, despite three separate appeals made by long-distance telephone, letter, and telegram. (Appen. Index, p. 39, Items 11, 15, R. R4, 99 — p. 41, Item 36, R. 142)

Section 409(b), on page 67 of the Communications Act, states in part as follows:

> "In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, *hear oral argument* on such exceptions before the entry of any final decision, order, or requirement."

Comment—Petitioner pleaded desperately with the Commission for oral argument on his case, as the only fair and sensible method of arriving at the true facts. His appeals for oral argument were summarily denied.

Section 409, paragraph c, (3) page 68 of the Communications Act, states in part as follows:

> "No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings."

Comment—In Petitioner's case, the Commission, apparently through the actions of its Staff members, not only consulted directly with the 4 major Television and Radio networks concerned, which practice was forcefully denounced by the Report of the anti-Trust sub-Committee of the House of Representatives Judiciary Committee, made public on June 9, 1957; but, in view of the revelations contained in the hearings before sub-Committee No. 1 of the U. S. House of Representatives Select Committee on Small Business, held on March 21, 1956, was definitely influenced by the 4 networks in the matter, and apparently told by the networks representatives to issue its April 11

and October 31, 1956, Directives against Petitioner, which resulted, unjustly and illegally, in Petitioner being denied the status of a "legally qualified candidate" by the Commission.

X.

Comments On Section 315 Of The Communications Act.

Section 315 of the Act is commonly known as the "Politicians Section." It comprises about 130 words in its entirety out of an approximate total of 32,000 words in the Act itself. Ordinarily, matters pertaining to Section 315 occur only every 4 years, during the year in which a President of the United States is being nominated and elected.

It is incredible of belief that the Commission should attach so little importance to the office of President, that it would not conduct public hearings attended by the Chairman and the other 6 Commissioners, when a dispute arises as to a citizen's legal qualifications as a candidate for President of the United States. There were 3 certified "legally qualified candidates" for President, in Illinois, on the Republican ballot, for the April 10, 1956 Presidential Primary Election, *viz.*, Dwight D. Eisenhower, William F. Knowland, and Lar (America First) Daly (Petitioner).

Admittedly, the first two are what is known in politics as "heavyweights", one being President of the United States, and the other a U. S. Senator from California and Minority Leader of his party in the United States Senate. Admitted, also, is the fact that the third candidate (Petitioner) was a "lightweight" in the vernacular of politics.

The first candidate (Dwight D. Eisenhower) was given free television and radio time, by the 4 networks, on Feb-

ruary 29, 1956, in which address the Commission publicly stated that Dwight D. Eisenhower was speaking as a political candidate, announcing his intention of seeking the 1956 Republican Presidential nomination, God willing, and his health permitting.

On March 1, 1956, in newspaper wire service reports appearing in practically every newspaper in the country, an "authorized spokesman" for the Commission stated that "only qualified Republican candidates for the 1956 Republican Presidential nomination were entitled to free and equal time to reply to Dwight D. Eisenhower, and that, *so far as he knew*, only William F. Knowland could claim the time."

Obviously, the "authorized spokesman" for the Commission did not know of the third "legally qualified candidate" in Illinois (Petitioner), who had been certified, along with Dwight D. Eisenhower and William F. Knowland, by the Illinois State Electoral Board, on February 8, 1956, in Springfield, Illinois.

If William F. Knowland, a "heavyweight" candidate, had done exactly the same things, and engaged in the same actions as Petitioner, a "lightweight" candidate during the Illinois 1956 Primary campaign, would the 4 networks have dared to refuse William F. Knowland the "free and equal time" when he requested it on March 4, 1956, from the network Presidents; and would the Commission have dared to refuse to declare William F. Knowland a "legally qualified candidate", and not order the 4 networks to give him the time?

Common sense answers that the 4 networks and the Commission would not have tried to deny William F. Knowland his legal rights as an American citizen. They did, however, deny the same rights to Petitioner, simply

because they considered him a "little-guy" and a "nobody" in politics, and thus would not be expected to command any political influence in his fight to secure those rights from the 4 networks and the Commission.

XI.

Petitioner's Telephone Talks With 6 Of The Commission's Members.

On April 16-19, 1956, the annual Convention of the National Association of Radio and Television Broadcasters was held in Chicago, Ill., at the Conrad Hilton Hotel. This is the most important yearly gathering of all the influential persons connected with the television and radio industry. The Chairman, and the other six members of the Commission, try to attend this Convention, if at all possible. In 1956, the Chairman and all 6 members of the Commission did attend.

On April 17 of 18, 1956, Petitioner spoke with 6 of the Commissioners personally, by house telephone, in the Conrad Hilton Hotel. This was 6 days after April 11, 1956, the date on which the Commission issued its first Directive against Petitioner, and 13 days after April 4, 1956, the date on which the Commission received Petitioner's personal appeal by letter to George C. McConnaughey, Chairman of the Commission.

All six members of the Commission told Petitioner on the telephone that they *had never even heard of his case before the Commission.* Two of the Commissioners were sympathetic to Petitioner's request, that he at least be allowed to appear before the full Commission personally, and plead his case as to being a "legally qualified candidate", in his own behalf. The other four Commissioners told Petitioner on the telephone that his case was prob-

ably being handled by the Staff of the Commission, and that they could not do anything to help him.

Petitioner made at least 25 telephone calls trying to reach Commission Chairman George C. McConnaughey personally, both to his suite in the Conrad Hilton Hotel, and his son's suite in the Ambassador East Hotel, Chicago. Petitioner knows for a fact that Chairman McConnaughey was often in the room when Petitioner phoned, but the usual answer to Petitioner by the party answering was that "Mr. McConnaughey is not in." It was obvious that Chairman McConnaughey did not want to talk to Petitioner about his case under any circumstances. All of the above telephone calls to the 6 members of the Commission, and the numerous attempts to reach Chairman McConnaughey, were made by Petitioner in the presence of at least 2 witnesses at all times.

XII.

Personal Talks Between Petitioner And His Attorney With General Counsels Of The Two Largest Networks In New York City.

In mid-July, 1956, Petitioner and his attorney visited New York City and personally talked with the General Counsels of the two largest networks. One of the General Counsels inferred that he was sympathetic to Petitioner's claim of being entitled to the "free and equal time", but that the final decision rested with the highest authorities of his network.

The General Counsel of the other network told Petitioner and his attorney to their faces, in the presence of one of his assistant counsels, that Petitioner did not have a possible chance of winning the 1956 Republican Presidential nomination; and that Petitioner had no possible chance of even having his name placed in nomination by a Delegate to the Convention.

When Petitioner and his attorney vigorously protested the flagrant "subjective determination" being employed by the General Counsel in the matter, which is expressly forbidden by the Rules and Regulations of the Commission, according to Question and Answer No. 12 of the Public Notice Primer of September 8, 1954, the General Counsel merely shrugged his shoulders and made no comment.

XIII.

When the Commission Should Have Declared Petitioner A "Legally Qualified Candidate", Forthwith, According to Its Own Rules and Regulations.

(A) On the day in mid-March, 1956, when the Commission knew of the letter from the Illinois Secretary of State to Petitioner, dated February 24, 1956, which stated, in clear and concise terms, the reasons why Petitioner must remain as a "legally qualified candidate" in Illinois, after the date of his certification by the Illinois State Electoral Board on February 8, 1956.

(B) On April 4, 1956, when the Commission was provided with the original of the above letter from the Illinois Secretary of State to Petitioner.

(C) On April 6, 1956, when the Commission received the telegram from the Indiana Secretary of State, in answer to its April 5, 1956 telegraphic request, which stated definitely, in clear and concise language, that Petitioner was a "legally qualified candidate" for President of the United States, on the Republican ballot, for the May 8, 1956, Indiana Presidential Primary Election.

(D) On May 9, 1956, when the Commission received the letter of reply from the Illinois Secretary of State, in response to its April 5, 1956 telegraphic request, which stated that Petitioner's name would remain on the Illinois

Republican ballot as a candidate for President of the United States, for the April 10, 1956 Presidental Primary Election in Illinois.

XIV.

No Justification for Commission's Doubts On and After April 6, 1956.

Any doubts the Commission may have had regarding Petitioner's Illinois certification of February 8, 1956, after receiving Petitioner's first appeal on April 4, 1956, became irrelevant and immaterial for all practical purposes when the Commission received the telegram from the Indiana Secretary of State on April 6, 1956, which confirmed Petitioner's status as a "legally qualified candidate" in Indiana to the Commission.

The Commission should not have even waited for the Illinois reply to its April 5, 1956 telegram to the Illinois Secretary of State. Question and Answer No. 25 of the Commission's Public Notice Primer of September 28, 1954, reads as follows: (Appendix 67a)

> "25. Question—If the candidate has received free time for a period of time and, subsequently, a second candidate announces his candidacy, is the second candidate entitled to equal facilities retroactive to the date when the first candidate announced his candidacy?
>
> Answer—Normally yes. Once the station has made time available to one qualified candidate, its obligation to provide equal facilities to future candidates begins. A candidate cannot, however, delay his request for time and expect to use the "equal opportunities" provision to force a station to turn over most of the last few pre-election days to him in order to "saturate" pre-election broadcast time. (Letter to Congressman Hunter, dated May 28, 1952; Letter to Congressman Frelinghuysen, dated March 2, 1954)."

Petitioner points out that he definitely was not a "future" candidate, as described above, in Answer 25. He was the first publicly announced 1956 Republican Presidential candidate in the country, according to nation-wide newspaper stories. His Illinois Presidential petitions were printed in August, 1955, and placed in the U. S. Mails for circulation throughout all 102 Counties in Illinois during August 1955, besides being circulated personally at that time. He appeared personally before thousands of people at the Illinois State Fair in Springfield, Illinois, on Governor's Day, in August 1955, attired in his "Uncle Sam" campaign costume, and passed out over 5000 of his campaign cards boosting his candidacy for the 1956 Republican Presidential nomination and, on January 23, 1956, he personally filed his Petition as a Republican candidate for President, for the April 10, 1956 Primary Election, with the Illinois Secretary of State, in Springfield, Illinois. This personal filing resulted in nation-wide newspaper, television, and radio publicity for Petitioner, in practically all daily American newspapers, on January 24 and 25, 1956.

From a viewpoint of logic and common-sense, it is ironic to think that the other two "legally qualified candidates" in Illinois, Dwight D. Eisenhower and William F. Knowland, did absolutely nothing to actively promote their filing in Illinois. Actually, their Presidential petitions were printed, circulated, and filed with the Illinois Secretary of State, not by themselves, but by persons who *did not have* the express consent of Dwight D. Eisenhower or William F. Knowland.

REASONS FOR GRANTING THE WRIT.

The Commission, in its Motion to Dismiss Petitioner's Petition for Review, bases its argument on two principal grounds, *viz.*:

1. That the issue is moot, and therefore, Petitioner has no justiciable case or controversy. (Appendix 16a, 17a)

2. That the gravamen of the Petition for Review is the same as that asked of the Commission in Petitioner's Formal Complaint of October 2, 1956, i.e., the "demand for free and equal" television and radio time from the 4 networks.

I.

Constitutional Supremacy of the States in All Election Matters.

(a) In answer to the first ground of the Commission's argument, Petitioner states: There most certainly is an "actual controversy", presently in existence in this case, so as to preclude its being a "moot" question, because there is a present and actual dispute existing between the two parties which affects one of the parties' legal rights. Petitioner and the Commission are in a genuine controversy, and in an adversary position to each other, which can best be stated by the following question:

> *"In the future, are the opinions of private commercial concerns (the 4 networks), or the administrative fiats of a Federal regulatory agency (the Commission) to take precedence over the official acts of the duly constituted authorities of the sovereign states of this Union, especially in matters pertaining to elections held within a state's borders, such as the right to determine and decide who is, and who is not, a legally qualified candidate for public office?"*

(b) If such private commercial opinions and Federal administrative fiats are to be the determining and decisive factor, then the presumed Constitutional rights of the sovereign States of this Union are a joke, and it would be best in all honesty and for all practical purposes, to immediately declare Article X of the Federal Bill of Rights to be null and void, and abolish it entirely.

(c) It is a generally accepted principle of American law that the sovereign States of this Union are supreme in all matters pertaining to elections held within their state borders, and Petitioner knows of no instance when that right has ever been successfully challenged and annulled. The following cases are cited as relevant to the supremacy of the States in *all* matters pertaining to elections, held within a State's borders:

1. "The election of a President is wholly in the power of the States and cannot be taken away or abdicated." *McPherson* vs. *Blacker* (1892) 146 U.S. 1.

2. "General Government can claim no powers which are not granted by the Constitution." *Martin* v. *Hunter's Lessee* (1816), 1 Wheaton 304.

3. "Where language of the Constitution is clear, no place for explanation, addition, or subtraction." *U. S.* v. *Missouri Pacific* (1929), 278 U.S. 269.

4. "The origin, relation, and functions of the Federal Government and States, clearly stated by Chief Justice Marshall." *Barron* v. *Baltimore* (1833) 7 Peters 243.

5. "Why State powers are not enumerated in the Constitution". Chief Justice Marshall in *Sturges* v. *Crowninshield* (1819), 4 Wheaton 122.

The Commission's contemptuous defiance of the inherent rights of the sovereign States, and its callous disregard for the Constitutional right of due process of law to an American citizen, in this matter, would be impossible of belief if they were not already an established fact.

"Due Process of law is guaranteed against the Federal Government by the Fifth Amendment, and against the States by the Fourteenth Amendment, in the Bill of Rights." *Davidson* v. *New Orleans* (1877), 96 U.S. 97.

II.

The Great Interests of a Public Character Asserted Are a Continuing One.

The "actual controversy" at issue in this case is not only of extreme importance to Petitioner personally, in view of the fact that he may again, at some time in the future, be a candidate for President of the United States, but also, it affects the interests and rights of all other American citizens who may be candidates for public office in the future.

This controversy is one of the most important questions concerned with American politics today. Petitioner, and all other future candidates for public office, must know now, whether, as a candidate for public office, he is to be guided by the Election Laws of the State in which he files for office, or whether he is to base his hopes as to being considered a "legally qualified candidate" on what the masters of the television and radio industry think about his political philosophy, and expect to have that private commercial opinion confirmed by a servile and innocuous Federal Communications Commission, which admittedly, by the public testimony of its own Chairman, is not the master of its own house.

III.

Precedent May Be Established By This Case.

Petitioner believes that this case, concerned with Section 315 of the Communications Act and filed under Public Law 901, is the first of its kind to reach the United States Supreme Court.

IV.

Why This Case Is Not Moot And The Declaratory Judgment Can Be Granted.

The Declaratory Judgment asked of the Court of Appeals in the 5 points of Petitioner's Petition for Review, can be granted under the powers of the Federal Declaratory Judgment Act. The following cases are cited to support Petitioner's argument:

The Supreme Court of the United States in 1937 in *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 81 L. Ed. 617, 57 S. Ct. 461, with Mr. Chief Justice Hughes as the organ of the Court, significantly stated that:

> "In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. . . . Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution 'did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.' . . . In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. The The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends . . . the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages . . . And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations

that irreparable injury is threatened are not required. . . . It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

300 U.S. 227, 240, 241, 244;
81 L. Ed. 617, 621-623.
57 S. Ct. 461, 463-465.

Judicial Interpretations Of The Term "Moot".

The Supreme Court of Colorado in 1936 in *Van De Vegt* v. *Board of Commissioners of Larimer County*, 98 Col. 161, 177, 55 P. 2d 703, 710, declared that: "A case is not moot where interests of a public character are asserted under conditions that may be . . . repeated . . . The problem here is of prime public concern and a continuing one. We are not warranted in relegating the parties to the condition which would result from withholding determination."

The Supreme Court of Oklahoma in 1947 in *Peppers Refining Company* v. *Corporation Commission*, 198 Okl. 451-453, 179 P. 2d 899, 901, quoted with approval the foregoing statement from the opinion in the *Van De Vegt* case.

The District Court of Appeal for the First Appellate District of California in 1937 in *United Press Associations* v. *Stockton Independent Publishing Company*, 19 Cal. App. 2d 432, 433, 65 P. 2d 893, 894, stated that:

> "The questions involved on this appeal are not mere moot and academic questions, but are questions of great practical importance to the parties. Despite the dismissal of the action in the trial court, the question of the rights and liabilities of the parties . . . still remains the subject of controversy."

The Appellate Court of Illinois in 1944 in *Appeal of Frank Foundries Corporation*, 323 Ill. App. 594, 600, 56

N. E. 2d 649, 652, declared that: " . . . if a substantial issue or question remains in the case, the cause is not moot."

The Court of Appeals of Ohio in 1948 in *Culver* v. *City of Warren*, 84 Ohio App. 373, 391, 392, 396, 83 N. E. 2d 82, 90, 92, stated that:

> "A determination of this suit and a dismissal of the appeal on the ground that the question is now moot would undoubtedly lead once again to the same method and pattern of exclusion and the process of discrimination could again be set in motion. If another suit were commenced it is easily conceivable and quite probable that by the time it would again reach a reviewing court it would again be argued that the matter was moot for the same reasons and on the same grounds . . . In the instant case there are interests of a public character . . . under conditions that may be . . . repeated. As we have heretofore observed, a pattern of governmental discrimination . . . has been set by the . . . authorities and the plaintiffs are entitled to a declaratory judgment so that there may not be a repetition of such conduct."

The Supreme Court of Mississippi in 1946 in *California Company* v. *State Oil and Gas Board*, 200 Miss. 824, 845, 27 So. 2d 542, 547, declared that:

> "It is next contended that the decision of the Circuit Court dismissing the appeal should be affirmed at all events by this Court on the alleged ground that the issue as to whether or not the appellee T. F. Hodge should be permitted to drill and operate an oil well at the location provided for in the granted exception has become moot, since the well has already been drilled and is now in operation. But we are unable to agree with this contention on account of the public interest involved herein."

The Supreme Court of Colorado in 1950 in *Reserve Life Insurance Company, Dallas, Texas* v. *Frankfather*, 123 Col. 77, 79, 225 P. 2d 1035, 1036, 39 A. L. R. 2d 146, 148, stated that:

> "There is no moot case or moot question where there are substantial rights or issues controverted in the case, and it is the duty of this court to review on writ of error any judgment of a trial court where substantial rights or issues are involved."

V.

Letters From Law Schools.

Petitioner submits the following letters from the Law Schools of Harvard, New York, and Northwestern Universities, in support of his contention that *he has* "alleged a justiciable case or controversy, and his case is accordingly not moot, nor the mere seeking of an advisory opinion upon an abstract question of law", as alleged by the Commission in its Motion to Dismiss Petitioner's Petition for Review, filed in the Court of Appeals on December 28, 1956.

Letterhead—Law School of Harvard University

May 17, 1957

Mr. Lar Daly
American Stool & Chair Co.
844 West Vermont Street
Chicago 43, Illinois

Dear Mr. Daly,

Your letter of May 14th has come to me.

The answer to your question, as you have put it, seems to me to be quite clear. If the question involved is really moot, and therefore academic, it would be the general rule of law that the petition should be dismissed. What constitutes mootness is a question,

and your understanding of that word may not be the same as mine. Also, I should say that where the petition is pending in a state court, this is a matter of state law, and the views of the several states may not always be the same.

The mere fact that an actual controversy was not one upon which a suit could presently be brought would not mean that the matter was moot or merely academic.

Very truly yours,
/s/ Erwin N. Griswold
Erwin N. Griswold
Dean

Letterhead—Northwestern University

May 24, 1957

Mr. Lar Daly, President
American Stool & Chair Co.
844 West Vermont Street
Chicago 43, Illinois

Dear Mr. Daly:

Dean Havighurst has referred to me your letter of May 14 requesting an opinion on the propriety of a dismissal of a petition for a declaratory judgment on the ground that the issue is moot and therefore academic.

As the Dean's letter to you indicates, it is impossible to supply a categorcial answer to your inquiry without a more detailed statement of the factual setting. The precise nature of the legal question and the occurrence which rendered it moot would be determinative. Since the federal authorities establish principles which vary in some respects from the Illinois law, the court in which the case was pending would have to be known.

For these reasons I regret that I cannot provide you with an answer. Without reference to your case, however, as a general proposition, a declaratory judgment can be granted only in cases of actual controversy, in which a present and actual dispute exists

between the parties and affects their legal rights. Mere abstract questions of law will not be answered. *On the other hand, it is not essential that the case be one in which the plaintiff could recover damages, obtain an injunction, or receive other relief of a coercive nature. No doubt it is this latter aspect of the declaratory remedy to which the lawyers you have consulted intended to refer.*

Yours very truly,
/s/ Harry B. Reese
Harry B. Reese
Professor of Law

HBR:dak

Letterhead—New York University School of Law

May 20, 1957

Mr. Lar Daly
American Stool and Chair Company
844 West Vermont
Chicago 43, Illinois

Dear Mr. Daly:

Dean Niles referred your letter of May 14 to me. It is my understanding that a complaint for a declaratory judgment can be and should be dismissed if the issues involved are moot or academic. That has been New York law and, I suspect, the law of most states, to the best of my knowledge. Our courts have said many times that they do not exist to decide academic questions. *As they have often remarked: the first requirement of a declaratory action is that a justiciable controversy be involved—that is, a genuine controversy between parties who are in an adversary position to each other.*

Yours very sincerely,
/s Herbert Peterfreund
Herbert Peterfreund
Professor of Law

HP:ms

VI.

Commission In Error On Alleged Gravamen In This Appeal Of Petitioner.

In answer to the second ground of the Commission's argument, Petitioner states:

(A) Nowhere in the 5 points of the Prayer for Relief of his Petition for Review, is the Court of Appeals asked to now order the Commission to direct the 4 networks to give him any "free and equal" television and radio time.

(B) The Court is merely asked to affirm the rights of the sovereign States to be supreme in all matters pertaining to elections held within their state borders; annul both Directives of the Commission against Petitioner as having been unjust and illegal in their entirety; and finally, issue a Declaratory Judgment that Petitioner was a "legally qualified candidate", between the dates of February 8 and August 22, 1956, inclusive, according to the applicable laws of the States of Illinois, Indiana, and Montana, and according to the Rules and Regulations of the Commission itself.

VII.

"Establish Justice".

The second stated purpose in the Preamble to the Constitution of the United States of America reads, "*ESTABLISH JUSTICE.*" Petitioner believes that this case is certainly one in which the meaning of those words should apply, and be put into practical effect.

VIII.

Aristotle's Immortal Dictum.

Aristotle, undeniably one of the greatest thinkers of all time, whose works have vastly influenced the shaping of

the political and social structure of Christian civilization, wrote in his Ethica Nicomachea, "ALL THAT IS UNFAIR IS UNLAWFUL, BUT NOT ALL THAT IS UNLAWFUL IS UNFAIR."

This immutable truism applies squarely to the central issue in Petitioner's case.

IX.

Equal Justice Under Law.

It seems more than mere coincidence that this appeal of Petitioner's is being read in the very building, upon the facade of which, chiseled in letters of stone, are the words constituting the heart and foundation of American jurisprudence, *viz.*: "EQUAL JUSTICE UNDER LAW", the only thing which Petitioner sought from the Commission in the first place.

CONCLUSION.

The final order of the Court of Appeals for the Seventh Circuit should be reversed and remanded.

Respectfully submitted,

Robert A. Kahn,
134 South La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

June, 1957.

APPENDIX.

In The United States Court of Appeals
For the Seventh Circuit
Chicago 10, Illinois

Lar Daly,
Petitioner,
v.
United States of America,
and
Federal Communications Commission,
Respondents.
Case No. 11946

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